Supreme Court, U.S.
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No. 96-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITIZENS UNITED,

Petitioner,

v.

UNITED STATES OF AMERICA,
WILLIAM JEFFERSON CLINTON,
JAMES MCDOUGAL, JIM GUY TUCKER,
SUSAN MCDOUGAL,
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, ET AL.,
AND DOW JONES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the lower courts' decisions violated the public's common law right of access to judicial records by refusing to grant members of the public access to a videotaped deposition containing the witness testimony of the President of the United States in a criminal trial, which was taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure, played to the jury in open court, and remains in the custody of the federal trial court?

2. Whether the lower courts' decisions violated the Petitioner's First Amendment rights by basing their refusal to allow Petitioner access to a videotaped deposition constituting a judicial record on the ground that the judicial record might be used to undermine the political popularity of the deponent, the President of the United States?

3. Whether the First Amendment entitles members of the public to receive post-trial access to videotaped deposition testimony, where the public had been barred from attending the court session and the witness' testimony was videotaped for use as a substitute for live testimony at trial?

4. Whether a nonprofit citizens advocacy group, that seeks, for its own use, a copy of the videotaped deposition of the President of the United States as a witness in a criminal trial, has standing to petition the courts for a copy of the videotape?

PARTIES BELOW

The Petitioner, Citizens United, was an Interested Party/Appellant in the court of appeals. Citizens United is a citizens advocacy group organized as a nonprofit social welfare organization, incorporated under the laws of the Commonwealth of Virginia; it does not have any parent companies or subsidiaries.

Respondent, United States of America, was the Plaintiff/Appellee in the court of appeals.

Respondent, William Jefferson Clinton, President of the United States, was an Interested Party/Appellee in the court of appeals.

Respondents, Reporters Committee for Freedom of the Press, Radio-Television News Directors Association, Capitol Cities/American Broadcasting Companies, Cable News Network, Inc., National Broadcasting Company, Inc. and CBS, Inc., were Movants/Appellants in the court of appeals in a related, but separate, case that was heard and decided together with Citizens United's appeal.

Respondents, James B. McDougal, Jim Guy Tucker and Susan McDougal, were Defendants/Appellees in the court of appeals. None of these individuals participated actively in the proceedings before the court of appeals.

Respondent, Dow Jones Company, Inc., was a Movant/Appellee in the district court. It did not participate actively in the proceedings before the court of appeals.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (App. 1a - 19a) are officially reported at 103 F.3d 651 (8th Cir. 1996). The opinion and judgment of the United States District Court for the Eastern District of Arkansas (App. 24a - 34a) are officially reported at 940 F.Supp. 224 (E.D. Ark. 1996).

ARGUMENT

I. THE PRESIDENT IGNORES THE FACTUAL RECORD AND HIS OWN ARGUMENTS BEFORE THE DISTRICT COURT AND COURT OF APPEALS, AND THE TRUE BASIS FOR THEIR RULINGS.

Throughout this entire litigation — at least until now — President Clinton has advocated a position that he now maintains was not a basis for the holding below, despite the fact that the position he advocated clearly was adopted by the District Court and the Court of Appeals. The President, in both his official capacity and his personal capacity, urged the courts below to deny Citizens United access to a copy of his videotaped testimony in the trial of his former Whitewater business partners on the grounds that Citizens United or others would "misuse" the videotape by employing it for partisan political purposes. Now that the case has come before this Court, however, the President seeks to distort the record by claiming the courts below did not base their decision upon "shield[ing] the President from political comment or criticism." (Brf. Op. 10). This representation is disingenuous at best.

The record on this point is crystal clear. The sole factual basis underlying the District Court's conclusion that the videotape might be subjected to distortion or misuse was the President's citation to the affidavit of Citizens United Chairman Floyd G. Brown, wherein Mr. Brown opined that "Citizens United seeks to copy, disseminate and broadcast portions of Mr. Clinton's videotaped testimony...in order to help educate and inform the public about an important event bearing on the integrity of public officials"; and news reports

in which Mr. Brown was reported to have stated that the videotape is "legitimate for campaign use." (*See* App. 53a n.2.) Moreover, in summarizing his opposition to the videotape's release, the President stressed that the tape "will be distorted for partisan purposes and commercial gain," which he claimed amounts to an "abuse" of judicial processes.[1] (App. 53a.) These concerns were reiterated before the Court of Appeals (*see* App. 60a n.15; and 63a n.4), and were the sole possible evidentiary basis of that court's conclusion that the District Court was properly concerned with potential misuse of the videotape.

Although the necessary factual predicate for the President's legal position must be based on the record developed in the courts below, *see FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 235 (1990), Mr. Clinton, in his opposition to Citizens United's certiorari petition, chooses to ignore the record below. Instead, without citation to a single fact in the record or elsewhere, he argues that the decisions below were predicated upon legitimate, but unidentified, general concerns over potential misuse of the videotape.

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[1] The President's claim herein is similar to the one that he recently made when he sought protection from civil law suits while occupying the Oval Office lest he be subjected to "a large volume of politically motivated harassing and frivolous litigation." This Court rejected that claim of presidential prerogative, ruling that there were adequate judicial safeguards against the misuse of the judicial process. *Clinton* v. *Jones*, 520 U.S. ___, 137 L. Ed. 2d 945, 969-70 (1997). While judges may properly police such misuse inside the courtroom, it is not within judicial power to police the First Amendment marketplace of ideas outside, especially when a ruling is designed, as here, to protect the reputation of a government official. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837-42 (1978). As James Madison put it: "If we advert to the nature of a republican Government, we shall find that the censorial power is in the people over the Government, not in the Government over the people." 4 *Annals of Congress* 934 (1794).

This Court should not be misled by the President's avoidance of the true and sole factual predicate for the decisions below. In both the District Court and the Court of Appeals, Mr. Clinton vigorously opposed release of the videotape on the grounds that its potential for use by his political adversaries in "attack ads" (App. 63a) was a valid, if not compelling, reason for keeping the tape under permanent seal. As Citizens United explained in its petition for writ of certiorari, such a basis for denying access cannot be reconciled with either the First Amendment or the public's common law right of access to judicial records, and should not be allowed to stand as precedent.

CONCLUSION

For the reasons stated herein, and in Citizens United's petition, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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